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Kinship and Marriage in Massachusetts Public Employee Retirement Law: An Analysis of the Beneficiary Provisions, and Proposals for Change

Jennifer Wriggins*

I. INTRODUCTION

It is commonly observed that "the American family" is changing.¹ Many statutes enacted earlier in the twentieth century, as well as numerous employer-supplied benefits, were based on a picture of a family consisting of a working father and a stay-at-home mother, together raising their children.² This picture, however, was never a completely

* Attorney, Pressman & Kruskal, Cambridge, Massachusetts. I am grateful for the help of Mary Ann Case, Elyse Cherry, Susan Farnsworth, Lillian Gonzalez, David Hofstetter, Paul T. Hynes, Martha McCluskey, Jean A. Musiker, Sive Neilan, Barbara J. Phillips of the Massachusetts Public Employee Retirement Administration, Mark Russo of the Massachusetts State Retirement Board, Peter Sacks, Jane Schacter, Barbara J. Ware of the Massachusetts Public Employee Retirement Administration, Gretchen Van Ness, Evan Wolfson, and the editors of the *New England Law Review*. Mary L. Bonauto's assistance was invaluable. The views expressed herein are my own; I take full responsibility for any errors.

1. *Only One U.S. Family in Four is 'Traditional,'* N.Y. TIMES, January 30, 1991, at A19. According to the article, in 1990 only 26% of American households were made up of a married couple and one or more children under eighteen. *Id.* See also BARBARA R. BERGMANN, *THE ECONOMIC EMERGENCE OF WOMEN* 4-6, 20-21, 51-54 (1986); *Recognizing Non-Traditional Families*, SPECIAL REP. SERIES ON WORK & FAMILY (BNA) No. 38 (Feb. 1991) [hereinafter BNA REPORT No. 38]; Craig A. Bowman & Blake M. Cornish, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164-65 (1992); Jerhold K. Footlick, *What Happened to the Family?*, NEWSWEEK, Special Issue, 1989, at 14.

2. See, e.g., MASS. GEN. L. ch. 32, § 89C (1961) (Annuities to Certain Widows of Employees Killed, or Who Died from Injuries Received, In Line of Duty). Many such statutes were struck down as unconstitutional in the 1970s as discriminatory on the basis of sex. For example, a statute providing that spouses of male members of the armed services were "dependents" for purposes of receiving military benefits, but spouses of female members were not "dependents" unless actually dependent on their wives for more than half their support, was held unconstitutional in *Frontiero*

accurate representation of reality, particularly for women who were not white.³ In recent years, recognition has grown that the image of the "traditional" American family does not match United States demographics⁴ and, consequently, that some of the laws based on this image operate unfairly when applied to those who live in "nontraditional" families.⁵ Over the last decade, the concept of extending certain employment benefits to "domestic partners"⁶ of employees in order to relieve some of these inequities has gained considerable ground in both the private and public sectors.⁷ In spite of these advances, however, domestic partnership ordinances and programs have thus far failed to deal with inequities in existing retirement programs.

A paradigmatic example of this unfair operation of laws, which has received scant public attention, is found in the beneficiary provisions of the Massachusetts Contributory Retirement System for Public Employees (retirement statute).⁸ The retirement statute is a critical arena in which to examine these issues because it governs the retirement of over

v. Richardson, 411 U.S. 677 (1973). A Social Security Act provision that awarded survivor's benefits to widows, but not to widowers responsible for dependent children, was struck down in *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

3. BLACK WOMEN IN WHITE AMERICA 227-84 (Gerda Lerner ed., 1972); JULIE A. MATTHAEI, AN ECONOMIC HISTORY OF WOMEN IN AMERICA 94-97, 133-36 (1982).

4. BERGMANN, *supra* note 1, at 4-6, 20-21; THE AMERICAN WOMAN 1990-1991: A STATUS REPORT 372-74, tbls. 10-12; 376 tbl. 14; 377 fig. 5; 378 tbl. 16; 380 fig. 6; 382 fig. 7 (Sara E. Rix ed. 1990); MATTHAEI, *supra* note 3, at 279-93; Footlick, *supra* note 1, at 16-17.

5. See, e.g., BNA Report No. 38, *supra* note 1; Cornish, *supra* note 1, at 1165-86; Robert L. Eblin, Note, *Domestic Partnership Recognition in the Workplace*, 51 OHIO ST. L.J. 1067, 1068-69 (1990); David Link, *The Tie That Binds: Recognizing Privacy and the Family Commitments of Same-Sex Couples*, 23 LOY. L.A. L. REV. 1055, 1057-58, 1079-80, 1099, 1114-18 (1990); John Wofford & Charles Colbert, *Sexual Orientation in the Workplace: The Strategic Challenge*, in COMPENSATION AND BENEFITS MANAGEMENT, Summer 1993, at 15; Lisa Zimmer, Note, *Family, Marriage, and the Same-Sex Couple*, 12 CARDOZO L. REV. 681, 681-84 (1990). See Massachusetts Governor Weld's Exec. Order No. 340, discussed *infra* at text accompanying notes 134, 145-46.

6. While the phrase "domestic partner" has no single meaning, it is generally intended to apply to those in an emotionally committed, co-habiting, intimate, nonmarital relationship. See *infra* text accompanying notes 134-45.

7. See, e.g., Cornish, *supra* note 1, at 1188-92; see Massachusetts Governor William F. Weld Executive Order No. 340 (1992); Boston Mayor Raymond L. Flynn Executive Order, *Extension of Certain Personnel Benefits* (Feb. 12, 1993); CAMBRIDGE, MASS. MUN. CODE ch. 2, § 119 (1992); BROOKLINE, MASS. DOMESTIC PARTNERS BY-LAW (June 2, 1993); *Labor Letter: A Special News Report on People and Their Jobs in Offices, Fields and Factories*, WALL ST. J., Jan. 25, 1994, at A1; David J. Jefferson, *Gay Employees Win Benefits for Partners At More Corporations*, WALL ST. J., Mar. 18, 1994, at C1, C5; see *infra* text accompanying notes 134-41.

8. MASS. GEN. L. ch. 32, §§ 9, 12(2) (1992). See text accompanying notes 21-132. This article does not deal with private employers' retirement benefits, nor does it discuss public retirement systems nationwide. Public employment retirement systems in the other New England states are discussed *infra* at notes 14, 76, and 117.

400,000 individuals in the Commonwealth, the largest number of individuals governed by any single retirement program in Massachusetts.⁹ Retirement programs are an extremely important part of an employee's compensation package, particularly in the context of public employment.¹⁰ Providing for employees during their retirement, and in some fashion for their dependents, is one of the common goals and characteristics of retirement plans.¹¹ Employee benefits, including retirement benefits, as a whole average 30.4 percent of the total compensation of public sector employees.¹² Retirement savings make up approximately 7.6 percent of compensation for public sector employees.¹³ Unlike a private employer's retirement plan, however, Massachusetts's retirement statute is a manifestation of the legislative will and reflects public policy. Thus, any inequities found are more troubling than those that might be found in private retirement plans. Such inequities are also subject to greater public debate, and perhaps to change, than those of a private retirement system.¹⁴

Part II of this article outlines the operation of the Massachusetts retirement statute, codified at Chapter 32 of the Massachusetts General Laws. The statute's beneficiary provisions, discussed in Part III of this article, contain a rigid and limited list of relatives who may receive certain valuable benefits after an employee's death.¹⁵ These statutory provisions significantly restrict the opportunity of public employees with

9. Retirement Boards of the Commonwealth, (Retired State, County, and Municipal Employee's Association of Massachusetts, June 1992). See also *Public Employee Retirement Administration*, REPORT FOR THE STATE EMPLOYEES' CONTRIBUTORY RETIREMENT SYSTEM 13 (1992) [hereinafter PERA REPORT].

10. See *infra* notes 12-13.

11. JEFFREY D. MAMORSKY, ed., EMPLOYEE BENEFITS HANDBOOK 1-2, 1-6, 10-25, 10-26, 10-27, 33-5 (2d ed. 1987) [hereinafter EMPLOYEE BENEFITS HANDBOOK].

12. EMPLOYMENT COST INDEXES AND LEVELS (BUREAU OF LABOR STATISTICS Sept. 1993), at 101, tbl. 26 [hereinafter EMPLOYMENT COST INDEXES AND LEVELS].

13. *Id.* at 102, tbl. 27. See *id.* at 10-17, 89, 93-94. For private employment, employment benefits constituted 28.7% of total compensation as of March 1993. *Id.* at 14, tbl. 11. For private employment, retirement savings made up only 2.9% of total compensation as of March 1993. *Id.* at 93, tbl. 18.

14. Two New England states, Maine and Connecticut, have revised their public employee retirement statutes in ways which make them operate more equitably towards those in "nontraditional" families. See ME. REV. STAT. ANN. tit. 5, § 17953 (West 1989) (amend. 1987); CONN. GEN. STAT. ANN. § 5-165(a)(2),(3) (West 1988); CONN. GEN. STAT. ANN. § 5-165a(c) (West 1988) (amend. 1983, P.A. 83-533, § 12). The public retirement statutes of the other New England states generally contain fewer of the types of limitations and inequities discussed in this article. See R.I. GEN. LAWS §§ 36-10-18, 36-10-19.1(b), 36-10-21, 36-10-23, 36-10-24 (1956); but see R.I. GEN. L. § 36-10-20 (1956); see N.H. REV. STAT. ANN. §§ 100-A:9, 100-A:11, 100-A:12 (amended 1991 & 1993), 100-A:13 (amended 1992), 100-A:13(a) (1990). See VT. STAT. ANN. tit. 3, §§ 464, 465, 468 (1985). But see N.H. REV. STAT. ANN. 100-A:8 (1990). See *infra* notes 76 & 117.

15. See *infra* text accompanying notes 38-112.

relationships that fall beyond the law's traditionally recognized ties of blood and marriage to provide for those individuals for whom they are responsible after their deaths.¹⁶

Part IV of this article examines several other provisions of the retirement statute, including those addressing accidental death benefits, in which the bright-line status of marriage is not the sole determinant on which entitlement to certain benefits turns.¹⁷ In various circumstances, the marital relationship's duration, nature, and status at the time of the employee's death are considered in awarding certain benefits. Eligibility for these benefits turns on both strict rules and case-by-case determinations as to the fairness and appropriateness of providing certain benefits to employees and their families.¹⁸ Given this legislative concern with, and the precedent of examining, the duration, substance, and nature of individual employees' marriage relationships, it is inconsistent and unnecessary to deny benefits to survivors of employees who are not in legally recognized relationships, regardless of the duration, substance, and nature of those relationships.¹⁹

Part V of the article examines several legislative options to further the goal of basic fairness to employees while protecting other interests of the system, and in conclusion recommends several specific changes.²⁰

II. THE FRAMEWORK OF THE MASSACHUSETTS PUBLIC EMPLOYEE CONTRIBUTORY RETIREMENT SYSTEM

A. *The Basic Structure*

The retirement system is part of the benefits package offered to the vast majority of Massachusetts's full-time public employees.²¹ Established in 1946, participation in the system is mandatory for employees

16. See *infra* text accompanying notes 60-112.

17. See *infra* text accompanying notes 113-32.

18. See *infra* text accompanying notes 113-32. The tension between bright-line rules and case-by-case determinations is of course not unique to the retirement statute, but recurs throughout law. See, e.g., KENNETH C. DAVIS, *ADMINISTRATIVE LAW* TEXT 19, 21-23 (3d ed. 1972); MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 15-17 (1987); Roscoe Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 940 (1923).

19. See *infra* text accompanying notes 60-112, 132-33. For other discussion of the retirement statute, see, e.g., Maria C. Walsh, *A Judicial Guide to Labor and Employment Law* 314-36 (1990) [hereinafter *Judicial Guide*]; Maureen Duval & Paul Todisco, *Pension Reserves Investment Management Board's Overview of the Massachusetts Public Employee Contributory Retirement Law* (May 15, 1992) (on file with author) [hereinafter *Overview*].

20. See *infra* text accompanying notes 133-74.

21. *Judicial Guide*, *supra* note 19, at 314.

who are eligible to participate.²² Depending on when the employee entered into public employment, thus becoming a "member" of the system,²³ between five and eight percent of the employee's gross paycheck is deducted from each member's paycheck as a mechanism for partially funding the retirement system.²⁴ Retirement is generally achieved after twenty years of creditable service.²⁵

An individual's retirement allowance is based on a formula involving the employee's age at retirement, years of service, the type of job the employee performed, and several other factors.²⁶ The retirement allowance consists of two parts. The annuity portion, based on the member's own contributions from payroll deductions comprises roughly ten

22. MASS. GEN. L. ch. 32, § 22(1)(b) (1992); Overview, *supra* note 19, at 1.

23. A "Member" in the context of the retirement statute is defined as:

any employee included in the state employees' retirement system, in the teachers' retirement system or in any county, city, town, the Massachusetts Turnpike Authority, the Massachusetts Housing Finance Agency, or the Massachusetts Port Authority contributory retirement system, the Massachusetts Bay Transportation Authority police retirement system, the Blue Hills Regional Vocational school retirement system, the Minuteman Regional Vocational Technical School District Employees' retirement system, and the Greater Lawrence Sanitary District Employees' retirement system, established under the provisions of sections one to twenty-eight, inclusive, or under corresponding provisions or earlier laws, and if the context so requires, any member of any contributory retirement system established under the provisions of any special law.

MASS. GEN. L. ch. 32, § 1 (1992). There are in fact 106 contributory retirement systems in the Commonwealth. PERA REPORT, *supra* note 9, at 19. The current retirement law gathers together many pre-existing statutes regulating public employee retirement systems. *Bianchi v. Retirement Board of Somerville*, 359 Mass. 642, 647, 270 N.E.2d 792, 795 (1971). For convenience, references in this article to public employees generally include any public employees covered by the retirement statute, Massachusetts General Law Chapter 32. The retirement statute defines "Board" as "the appropriate retirement board established under the provisions of section twenty having jurisdiction of any contributory retirement system established under the provisions of sections one to twenty-eight inclusive . . ." MASS. GEN. L. ch. 32, § 1 (1992).

24. MASS. GEN. L. ch. 32, § 22(1)(b) (1992); Overview, *supra* note 19, at 3.

25. "Creditable service" is "all membership service, prior service and other service for which credit is allowable to any member under the provisions of sections one to twenty-eight inclusive." MASS. GEN. L. ch. 32, § 1 (1992). Details as to the application of the term "creditible service" are found in MASS. GEN. L. ch. 32, § 4 (1992). Exceptions to this twenty year standard apply to members of the retirement system who began their state employment before January 1, 1978. MASS. GEN. L. ch. 32, § 5 (1992). These members may retire at any time after age fifty-five regardless of the number of years served. See MASS. GEN. L. ch. 32, §§ 1, 4 (1992); *Judicial Guide*, *supra* note 19, at 314. Members employed January 1, 1987 or thereafter, after reaching age fifty-five, can retire after ten years of creditable service. See MASS. GEN. L. ch. 32, § 5 (1992).

26. See MASS. GEN. L. ch. 32, § 5 (1992).

percent of the allowance.²⁷ The second part, or pension portion, comprises the remaining ninety percent, or so, provided by the governmental employer.²⁸ The amount of retirement allowance also depends on the type of allowance chosen by the employee.²⁹

Several provisions of the statute permit a member to designate a beneficiary to receive certain payments after the member's death. As discussed in more detail below,³⁰ the statute gives members considerable, but not unlimited, control over the disposition both of their own contributions from payroll deductions and of interest on those contributions.³¹ In contrast, members' control over the choice of beneficiary for their retirement allowance, which includes the much more valuable pension portion, is strictly limited.³² The retirement statute also includes various other provisions, discussed below, pertaining to benefits that certain relatives may receive after a member's death.³³

27. *Judicial Guide*, *supra* note 19, at 314. "Annuity" is defined as "payments dependent upon the continuance of life of any member and derived from his accumulated regular deductions or from his accumulated additional deductions, if any, or from both, as the case may be." MASS. GEN. L. ch. 32, § 1 (1992). "Additional deductions" are amounts that a member can specify be deducted from his paycheck. *Id.* "Pension" is defined as "payments dependent upon the continuance of life of any member or beneficiary and derived from contributions made by the appropriate governmental unit." *Id.* "Retirement allowance" is defined as "the sum of the amount of the annuity and the amount of the pension provided for in sections one to twenty-eight inclusive." *Id.*

28. *Judicial Guide*, *supra* note 19, at 314.

29. Section 12(2) contains three options for types of retirement allowances from which an employee can select one. MASS. GEN. L. ch. 32, § 12(2) (1992). *See infra* text and accompanying notes 50-65.

30. *See infra* text accompanying notes 42, 46-49.

31. MASS. GEN. L. ch. 32, § 11(2)(c) (1992). *See infra* text accompanying notes 40-41, 43-45, and chart accompanying notes 66-75.

32. MASS. GEN. L. ch. 32, § 12(2) Options (c), (d) (1992). *See infra* chart accompanying notes 66-75. An additional issue is that of health insurance for employees of the Commonwealth and their dependents. Massachusetts General Laws Chapter 32A, § 5 provides that state employees are automatically entitled to receive health insurance. Massachusetts General Laws Chapter 32A, § 11 states that the surviving spouse or surviving dependent of an employee or retired employee of the Commonwealth may continue general health coverage. A "dependent" is defined as "an employee's spouse, his unmarried children under nineteen years of age, and any child nineteen years of age or over who is mentally or physically incapable of earning his own living . . ." MASS. GEN. L. ch. 32A, § 2(d) (1992). This issue, although it has been much discussed in the context of domestic partnerships, is beyond the scope of this article. *See supra* notes 5, 7, and *infra* notes 134-41.

33. MASS. GEN. L. ch. 32, §§ 9(1), 12(2) Option (d), 12B (1992). *See* text accompanying notes 113-32.

B. *Funding of the Retirement System*

Although deductions from employees' wages are used partially to fund the retirement system, the system was not initially intended to be, nor is it, funded entirely from workers' contributions.³⁴ The remainder of the system's obligations were left to be funded on a "pay-as-you-go" basis, meaning that appropriations must be made annually for payment of current benefits to retirees.³⁵ Due to the large amount of liabilities for members' past service (unfunded liabilities), and the uncertainty of tax revenues from which to fund anticipated liabilities, the General Court organized an investigation into the operation of the law in the early 1980s.³⁶ This investigation eventually resulted in the passage of several pieces of legislation aimed at streamlining the system and creating several reserve funds with the goal of eventually eliminating unfunded liabilities.³⁷

III. CHOICE OF BENEFICIARY PROVISIONS

A. *The Statutory Framework*

The distinction between a member's own contributions (the annuity), and the pension itself, which consists of contributions derived from the appropriate governmental unit, is critical to an understanding of the retirement system.³⁸ A "retirement allowance" consists of the sum total of the member's annuity and pension.³⁹ It is also useful to bear in mind the distinction between a member dying before reaching retirement, and a member dying after reaching retirement.

1. *Dying Before Retirement*

If a member dies before retirement, one of two things can occur regarding his or her benefits, assuming that no exceptions apply. First, if the member has chosen a beneficiary from a limited list of relatives,⁴⁰ a one-time immediate payment of two-thirds of the total retirement

34. See Overview, *supra* note 19, at 3.

35. *Id.*

36. *Id.*

37. *Id.*; MASS. GEN. L. ch. 32, §§ 22, 23 (1992); see also PERA REPORT, *supra* note 9, at 5.

38. MASS. GEN. L. ch. 32, § 1 (1992).

39. *Id.*

40. If a member dies before retirement, without having chosen a beneficiary for the Member Survivor Allowance, the member's spouse may elect to receive the allowance in some circumstances. MASS. GEN. L. ch. 32, § 12(2) Option (d) (1992). This alternative way of obtaining the Member Survivor allowance is discussed in more detail at text accompanying notes 124-32.

allowance to which he or she would have been entitled had retirement taken place on the date of death will be paid to the chosen relative.⁴¹ Alternatively, if the employee has chosen a beneficiary not on the limited list of relatives, only his or her contributions, together with accrued interest, can be paid to the non-relative beneficiary.⁴² The beneficiary under the first scenario, i.e., chosen from the statute's limited list, will generally receive a much greater payout than the beneficiary under the second option.

Each of these two outcomes will be discussed in more detail. Under the first scenario, a member may nominate a beneficiary within a narrow list of relatives as a "Member Survivor." If the member dies before reaching retirement, the "Member Survivor" will get a payout equal to two-thirds of the total amount of the "Option (c)" retirement allowance to which the member would have been entitled had retirement taken place on the date of death.⁴³ The Option (c) retirement allowance is one of several retirement allowance options from which members may choose upon their retirement.⁴⁴ The only persons that a member may nominate to receive this Member Survivor Allowance are the member's "spouse[,] former spouse who has not remarried, child, father, mother, sister or brother"⁴⁵

Regarding the second scenario, the payment of a member's contributions to a beneficiary, any member may nominate on a prescribed

41. MASS. GEN. L. ch. 32, § 12(2) Option (d) (1992).

42. MASS. GEN. L. ch. 32, § 11(2)(b), (c) (1992).

43. MASS. GEN. L. ch. 32, § 12(2), Option (d) (1992). Note that the Member Survivor Allowance only applies if the employee dies before retirement. See *infra* chart accompanying notes 66-75.

44. See *infra* text accompanying notes 56-65.

45. MASS. GEN. L. ch. 32, § 12(2) Option (c) (1992). According to Option (c), if a spouse receiving an allowance as a beneficiary dies, leaving children of the beneficiary and the deceased employee who are under eighteen years of age, the children's guardian will receive the spouse's share. *Id.* The option further provides that if a member has not designated an eligible beneficiary other than his or her spouse under Massachusetts General Laws Chapter 32, § 12(2) Option (c), with some conditions the spouse may elect to receive the Member Survivor Allowance, § 12(2) Option (d). If the spouse elects to receive the allowance, the spouse will receive an additional allowance for each minor, incapacitated, or under twenty-two year old student child. See MASS. GEN. L. ch. 32, § 12B (1992). If the spouse does not elect to receive the allowance, and prior to death the member had designated a beneficiary under the more liberal provisions of § 11(2)(c), then the accumulated total deductions of the member shall be given to the surviving beneficiary chosen under § 11(2)(c). MASS. GEN. L. ch. 32, § 12(2) Option (d) (1992). If there is no other surviving beneficiary, the spouse shall receive the member's accumulated total deductions. *Id.* On a member's death, the board shall notify the spouse and children of the member what information is necessary to determine their eligibility for benefits. MASS. GEN. L. ch. 32, § 12(c) Option (d) (1992). Remarriage of the spouse reduces the Member Survivor Allowance. *Id.*

form "one or more beneficiaries to receive" the return of the employee's contributions if he or she dies before retirement, according to the retirement statute's section 11(2).⁴⁶ The statute contains several exceptions to an employee's ability to nominate any person to receive his or her contributions. For example, if the deceased employee has nominated a beneficiary for part of the retirement allowance under the more limited provisions of section 12(2) Option (d) (Member Survivor Allowance),⁴⁷ payment of the member's contributions to a beneficiary under section 11(2) shall not be made.⁴⁸ Thus, a member cannot "split" retirement benefits by giving contributions to a non-relative and part of the pension to a relative. Another exception occurs when an employee is survived by a dependent child and payment is not made under the broad provisions of section 11(2).⁴⁹ Apart from these exceptions, an adult member may nominate whoever he or she wishes to receive his or her contributions upon death.

2. Dying After Retirement

A member who survives until the age of retirement and becomes eligible for retirement can retire and choose from three different options with respect to retirement benefits.⁵⁰ Each option is tailored to advance different goals of different employees, and together they present a rather broad range of options for employees to choose from, depending on their family situations and wishes. For an individual who seeks to have the maximum amount of income during his or her life and has no person to whom he or she seeks to leave any benefits, Option (a), the "Life Annuity," is the obvious choice. It is a "full retirement

46. MASS. GEN. L. ch. 32, § 11(2)(c) (1992). This subsection also contains the proviso that "any such beneficiaries nominated by a minor shall be of his kindred." *Id.* § 11(2)(c). See *infra* chart accompanying notes 66-75.

47. *Id.* § 12(2) Option (d). The list of possible beneficiaries for MASS. GEN. L. ch. 32, § 12(2) Options (c) and (d) is actually contained in Option (c). See *infra* text accompanying notes 124-32.

48. MASS. GEN. L. ch. 32, § 11(2)(c) (1992). In such an instance, return of contributions and interest would be made under the provisions of § 12(2).

49. *Id.* Specifically, if the deceased employee is a male and is survived by a person eligible to receive the pension allowance as set forth in § 12B (which provides for an additional allowance for spouses and children of surviving members), or is a female and is survived by a child eligible according to § 12B, the return of contributions to the designated beneficiary shall not be made. MASS. GEN. L. ch. 32, § 11(2)(c) (1992). If "the widow" or guardian of the minor child chooses not to elect to receive the benefits to which they would otherwise be entitled, the benefits will be paid in accordance with the employee's choice. MASS. GEN. L. ch. 32, § 11(2)(c) (1992).

50. MASS. GEN. L. ch. 32, § 12(1) (1992). If a member lives to retirement and dies without having chosen an option, the retirement allowance is paid as in § 12(2) Option (b) (1992). MASS. GEN. L. ch. 32, § 12(1) (1992). See *infra* notes 52-65 and accompanying text. See also *infra* chart accompanying notes 66-75.

allowance," including a pension, which does not provide payment to any beneficiaries.⁵¹ All payments are made during the member's life and terminate upon death.

Option (b), the "Cash Refund Annuity," involves a member receiving a cash annuity consisting generally of employee contributions and a pension.⁵² But if the employee dies before the annuity portion disbursed equals the amount of contributions made, the beneficiary as designated in the permissive provisions of section 11(2)⁵³ receives the balance of the member's contributions.⁵⁴ If the employee dies after having received annuity payments which are *greater* than the amount of employee contributions, the beneficiary receives nothing.⁵⁵ The beneficiary does not under any circumstances receive the pension.

The final choice, Option (c), is the "Joint and Last Survivor Allowance." This option is designed for persons who want to provide for a beneficiary as well as receive a retirement allowance. Under Option (c), a member gets a reduced retirement allowance during his or her lifetime.⁵⁶ After the member's death, the eligible beneficiary receives two-thirds of the member's retirement allowance for the beneficiary's lifetime.⁵⁷

This "Joint and Last Survivor Allowance" is a very valuable benefit, but unlike the treatment of employee contributions made to the system, the employee is only allowed to designate a beneficiary from certain limited categories of people.⁵⁸ Under this provision, as with the Member Survivor Allowance discussed above,⁵⁹ "[n]o person shall be eligible for nomination as beneficiary . . . unless such person is the spouse[,] former spouse who has not remarried, child, father, mother, sister or

51. MASS. GEN. L. ch. 32, § 12(2) Option (a) (1992). The life annuity is a full retirement allowance payable to such member which shall consist of a regular life annuity, a pension, and an additional life annuity. *Id.*

52. MASS. GEN. L. ch. 32, § 12(2) Option (b) (1992).

53. *See supra* notes 42, 46-49 and accompanying text.

54. MASS. GEN. L. ch. 32, § 12(2) Option (b) (1992).

55. *Id.*

56. MASS. GEN. L. ch. 32, § 12(2) Option (c) (1992); PERA REPORT, *supra* note 9, at 23.

57. MASS. GEN. L. ch. 32, § 12(2) Option (c) (1992). Once the member reaches retirement, the 12(c) beneficiary choice becomes irrevocable: if the beneficiary dies on or after the date the retirement allowance becomes effective, but before the death of the member, the member shall be paid a full retirement benefit under Option (a) and may not designate anyone else to receive the benefit. MASS. GEN. L. ch. 32, § 12(2) Option (c) (1992). If, however, the beneficiary dies before the date the retirement allowance becomes effective, the member may make a new election under Option (a), (b), or (c). *Id.*

58. MASS. GEN. L. ch. 32, § 12(2) Option (c) (1992).

59. *See supra* text accompanying notes 40-41, 43-45.

brother of such member."⁶⁰ No person can be a member's Joint and Last Survivor other than one who falls within the categories of the spouse or immediate family. The Joint and Last Survivor Allowance is the only means by which an employee may provide an annual allowance for a named beneficiary. If an employee does not have a spouse, a former spouse who has not remarried, or a relative on the authorized list to whom he or she wants to bequeath these benefits, the employee must take either the Life Annuity option,⁶¹ using the entire retirement benefit, or the Cash Refund Annuity,⁶² which allows an employee to give a portion of his or her contributions to a designee outside the retirement allowance beneficiary provisions of Option (c) if any contributions remain at the time of death.⁶³ All of the three options included in section 12(2) are actuarially equivalent.⁶⁴ This means that each is designed to cost the public employer the same amount.⁶⁵

60. MASS. GEN. L. ch 32, § 12(2) Option (c) (1992). If a spouse receiving an allowance as a beneficiary dies leaving children of the deceased employee and the beneficiary who are under eighteen years of age, the children's guardian will receive the member's share. *Id.* This list is hereinafter referred to as the "retirement allowance beneficiary" provisions.

61. MASS. GEN. L. ch. 32, § 12(2) Option (a) (1992).

62. MASS. GEN. L. ch. 32, § 12(2) Option (b) (1992).

63. As allowed by MASS. GEN. L. ch. 32, § 11(2) (1992).

64. MASS. GEN. L. ch. 32, § 12 (2) Option (c) (1992).

65. "Actuarial equivalent" is defined by the retirement statute as "any benefit of equal value when computed upon the basis of the Combined Annuity Table of Mortality set back one year and interest at the rate of three per cent [sic] per annum." MASS. GEN. L. ch. 32, § 1 (1992).

An additional definition of "actuarial equivalent" is, "[i]f the present value of two series of payments is equal, taking into account a given interest rate and mortality according to a given table, the two series are said to be actuarially equivalent. For example, under a given set of actuarial assumptions, a lifetime monthly benefit of \$67.60 beginning at age 60 can be said to be the actuarial equivalent of \$100 a month beginning at age 65. The actual benefit amounts are different but the present value of the two benefits, considering mortality and interest, is the same." EMPLOYEE BENEFIT PLANS: A GLOSSARY OF TERMS 3 (June M. Lehman, ed., 6th ed. 1987).

TABLE I

1. Death Occurs Before Retirement	
Type of Funds:	Beneficiary Options:
A. Member's Own Contributions plus interest ⁶⁶	Employee's Choice ⁶⁷
B. Two-Thirds of total retirement allowance to which member would have been entitled if retirement had taken place on date of death (Member-Survivor Allowance) ⁶⁸	Spouse, former spouse who has not remarried, siblings, children, parents ⁶⁹
2. Death Occurs After Retirement	
Options:	
(a) Life Annuity. Full pension plus annuity, received by member during lifetime ⁷⁰	None ⁷¹
(b) Cash Refund Annuity. Cash annuity including annuity plus pension for member's lifetime; beneficiary receives balance of employee's contributions if employee dies before receiving annuity payments greater than her contributions ⁷²	Employee's choice ⁷³
(c) Joint and Last Survivor. Reduced allowance during member's lifetime; beneficiary receives two-thirds of the member's retirement allowance during her lifetime ⁷⁴	Spouse, former spouse who has not remarried, siblings, children, parents ⁷⁵

66. MASS. GEN. L. ch. 32, § 11 (2)(a) (1992).

67. MASS. GEN. L. ch. 32, § 11 (2)(c) (1992).

68. MASS. GEN. L. ch. 32, § 12 (2) Option (d) (1992).

69. MASS. GEN. L. ch. 32, § 12(2) Options (c), (d) (1992).

70. MASS. GEN. L. ch. 32, § 12(2) Option (a) (1992).

71. MASS. GEN. L. ch. 32, § 12(2) Option (a) (1992).

72. MASS. GEN. L. ch. 32, § 12(2) Option (b) (1992).

73. MASS. GEN. L. ch. 32, §§ 12(2) Option (b), 11(2) (1992).

74. MASS. GEN. L. ch. 32, § 12(2) Option (c) (1992).

75. MASS. GEN. L. ch. 32, § 12(2) Option (c) (1992).

B. *Implications of the Limitations on Choice of Beneficiary*

The limitations on beneficiaries of the Joint and Last Survivor Allowance and the Member Survivor Allowance in certain respects deprive some deserving members of the right to control their benefits as opposed to other members.⁷⁶ Employees are only allowed to retire after providing loyal service to the Commonwealth for many years.⁷⁷ The retirement allowance, as well as the opportunity to name those closest to one as beneficiaries, are intended to constitute part of the reward for such loyal service.

For example, if an unmarried, long-divorced, or never-married member has no living children, parents, or siblings, but does have an extremely close friend for whom he or she wishes to provide, under the present system the member is not permitted to name the friend as beneficiary of either the Joint and Last Survivor Allowance⁷⁸ or the Member Survivor Allowance.⁷⁹ The member may provide for a return of contributions to the friend if the employee dies before retirement.⁸⁰ If the employee lives to retirement, he or she must choose between the Life Annuity Option⁸¹ and the Cash Refund Annuity.⁸² The Cash Refund Annuity allows for the return of a portion of the employee's contributions to the friend/beneficiary, depending on how long the member lives. If a member has a close friend and a living brother, however, the member is unable both to bequeath the contributions to the friend *and* name the brother as beneficiary of the Joint and Last Survivor Allowance. If the brother is named as the Joint and Last Survivor⁸³ or Member Survivor⁸⁴ beneficiary, the close friend cannot

76. The public retirement statute of the other New England states contain fewer limitations on who an employee may choose to be a beneficiary of a retirement allowance than Massachusetts. In fact, Vermont, New Hampshire, Connecticut, and Maine have no limitations on whom an employee may designate for receipt of an allowance. VT. STAT. ANN. tit. 3, § 468 Options 2, 3, 4 (1985); CONN. GEN. STAT. ANN. § 5-165 (a)(2), (3) (West 1988); N.H. REV. STAT. ANN. § 100-A:13 Options 2, 3 (1990); ME. REV. STAT. ANN. tit. 5, § 17953(2) (West 1989). Rhode Island only requires that a recipient of a retirement allowance have an insurable interest in the employee's life. R.I. GEN. LAWS § 36-10-18 (a), (b) (1990).

77. See MASS. GEN. L. ch. 32, § 5 (1992). Twenty years of creditable service is generally required before retirement is achieved. *Judicial Guide*, *supra* note 19, at 314 (citing MASS. GEN. L. ch. 32, § 5 (1992)). See *supra* text accompanying note 25.

78. MASS. GEN. L. ch. 32, § 12(2) Option (c) (1992).

79. MASS. GEN. L. ch. 32, § 12(2) Option (d) (1992).

80. MASS. GEN. L. ch. 32, § 11(2) (1992).

81. MASS. GEN. L. ch. 32, § 12(2) Option (a) (1992).

82. MASS. GEN. L. ch. 32, § 12(2) Option (b) (1992).

83. MASS. GEN. L. ch. 32, § 12(2) Option (c) (1992).

84. MASS. GEN. L. ch. 32, § 12(2) Option (d) (1992).

be named to receive the return of employee contributions under section 11(2).⁸⁵

Another example is that of two unmarried individuals in a heterosexual relationship who consider themselves to be spouses, live together, share their incomes, and name each other as beneficiaries in their wills. In such a scenario, the female member could not name her "spouse" as beneficiary of the Joint and Last Survivor Allowance or the Member Survivor Allowance. If she dies before retirement, the only way her partner can receive any of her benefits or contributions only is if she had named him under section 11(2) as beneficiary of her contributions. If she dies after retirement, the only way he can receive any of her benefits or contributions is if she had chosen the Cash Refund Annuity and dies prior to receiving an amount equal to the contributions she had made to the system. If the member dies before retirement, the "spouse" could not possibly elect to receive the Member Survivor Allowance, because non-spouses are not permitted to make such elections.⁸⁶

If the heterosexual couple married, the member would instantly be able to name her husband as Joint and Last Survivor and Member Survivor beneficiary.⁸⁷ If she dies before retirement and had neglected to name her husband or any other person as beneficiary, her husband could elect to receive the Member Survivor Allowance, assuming that the couple had been married a year and was living together at the time of her death.⁸⁸

An additional example is of two individuals in a homosexual relationship, who consider themselves to be spouses, live together, share support of each other, name each other as beneficiaries in their wills, and whose relationship shares many of the characteristics of a traditional marriage. A member of the retirement system in such a situation would have no way of providing for his or her partner with the Member Survivor Allowance or the Joint and Last Survivor Allowance, even if the partner was completely dependent on the member for financial support.⁸⁹

85. MASS. GEN. L. ch. 32, § 11(2)(c) (1992).

86. MASS. GEN. L. ch. 32, § 12(2)(d) (1992).

87. MASS. GEN. L. ch. 32, § 12(2)(c) (1992).

88. MASS. GEN. L. ch. 32, § 12(2)(d) (1992). Also, the employee must have been a member for at least two years. *Id.* See *infra* text accompanying notes 124-32.

89. It is illegal in Massachusetts for an employer, "because of the . . . sexual orientation . . . of any individual . . . to discriminate against such individual in compensation or in terms, conditions, or privileges of employment, unless based upon a bona fide occupational qualification." MASS. GEN. L. ch. 151B, § 4(1) (1992). Chapter 151B, section (4)(1) of the Massachusetts General Laws does not outlaw discrimination on the basis of marital status. It may be argued that the limitations in the retirement allowance beneficiary provisions effectively offer lower compensation and less favorable terms, conditions, and privileges of employment to gay and lesbian employees than to heterosexual employees. A heterosexual employee can marry her partner and thus may name his or her spouse (or former spouse) as a

retirement allowance beneficiary. By contrast, a gay or lesbian employee cannot marry his or her partner and is thus unable to provide the same benefits to the partner (or former partner).

Participation in the system is mandatory for employees. An employee cannot set up an individual retirement account (for which he or she could choose any beneficiary) during any year when he or she is a member. I.R.C. § 219(g) (1988). Thus, an employee's mandatory participation in the system affects retirement planning in a significant manner.

The success of a discrimination claim is uncertain but possible. First, an amendment to several sections of Chapter 151B states: "[N]othing in this act shall be construed so as to legitimize or validate a 'homosexual marriage,' so-called, or to provide health insurance or related employee benefits to a 'homosexual spouse,' so-called." 1989 Mass. Acts. ch. 516, § 19. This language has not been construed in any reported decisions.

One issue in a discrimination case is likely to be whether a retirement allowance is an "employee benefit" which is "related" to "health insurance." Chapter 151B by its terms is to be construed liberally to accomplish its purposes, which include opposing discrimination on the basis of sexual orientation in employment. MASS. GEN. L. ch. 151B, § 9 (1992). The retirement statute operates largely independently of any provisions relating to state employees' health insurance. See *supra* note 32. Moreover, many employers provide health insurance benefits that do not provide retirement benefits. (For private employers, health insurance costs comprise 7.2% of total compensation, while retirement costs comprise 2.9% of total compensation). See EMPLOYMENT COST INDEXES AND LEVELS, *supra* note 12, at 11. Retirement benefits clearly serve different purposes from health insurance benefits, as retirement benefits are aimed at providing income to retired employees and their dependents, while health insurance benefits are aimed at protecting employees from unexpected financial loss caused by injury or illness to their families or themselves. Employee Benefits Handbook, *supra* note 11, at 1-2, 1-6, 33-5. Thus, a retirement allowance may be considered a benefit which is not related to health insurance.

Even apart from the amendment discussed above, are the retirement allowance beneficiary provisions discriminatory in violation of Chapter 151B? The logic of Massachusetts Governor Weld's Executive Order 340 (discussed *infra* at text accompanying note 134) compels an affirmative answer. The Executive Order acknowledges the Commonwealth's obligations under Chapter 151B "to protect its citizens from discrimination on the basis of sexual orientation," and directs the personnel department to promulgate such regulations "as are necessary to eliminate discrimination on the basis of sexual orientation in the benefits provided to employees under its jurisdiction." Executive Order 340, *infra* note 134. The Order goes on to provide a narrow list of benefits which are being extended, such as bereavement leave for an employee whose domestic partner or domestic partner's family member has died. If it is discriminatory to not allow an employee to take bereavement leave when his or her domestic partner dies, it is also discriminatory to not allow an employee to provide a retirement allowance to his or her domestic partner when the employee dies.

Some legal support may be found for arguing that the retirement allowance beneficiary scheme is discriminatory, although such arguments have not gained broad approval. The Vermont Labor Relations Board in June 1993 ruled against the University of Vermont that the university violated its non-discrimination policies prohibiting discrimination on the basis of sexual orientation, by denying medical benefits to domestic partners of employees while extending benefits to spouses of employees. Grievance of: B.M., S.S., C.M., and J.R., No. 92-30, at 214 (Vermont

The beneficiary provisions applicable to the Joint and Last Survivor Allowance and the Member Survivor Allowance were amended in 1991 to permit a member to designate a "former spouse who has not remarried" as a beneficiary.⁹⁰ This addition apparently was made in order to make it more practical to divide pensions in the context of domestic relations orders in divorce actions.⁹¹ This addition is significant because it expands the retirement allowance beneficiary provisions to include persons not related to members by blood or by marriage. It does not limit beneficiary choices to those aimed at supporting "traditional" families, i.e., a "former spouse" by definition is generally not part of the family unit (or he or she would not be a former spouse). It is also at odds with the provisions concerning the spouse of a member electing to receive the Member Survivor Allowance, which state that the allowance may be denied if the parties were not living together at the time of the member's death.⁹²

It may be argued that the limited beneficiary choices of the Joint and Last Survivor Allowance and the Member Survivor Allowance are appropriate because limiting the choices to relatives by blood and marriage (except for former spouses) allows the benefits to be targeted at dependents of employee-members. Indeed, it is an overriding goal of the retirement system to provide for the dependents of employee-mem-

Labor Relations Bd. 1993). The Vermont Labor Relations Board applied a disparate impact analysis based on *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), stating that "[o]nce the employee demonstrates that the employer[s] practice causes a disparate impact on a protected class, the practice is prohibited unless the employer can demonstrate that the practice is related to job performance and [is] consistent with business necessity." *Id.* at 216. The Board found that excluding unmarried domestic partners of employees from health benefits had a "markedly disproportionate impact on gay and lesbian employees compared to heterosexual employees." *Id.* at 218. Finding no business necessity, the Board ordered the University to provide domestic partner benefits. *Id.* at 220-21. A similar disparate impact analysis was used in *Anglin v. City of Minneapolis*, Minneapolis Library Bd., No. 88180 EM-12 (City of Minneapolis Comm'n on Civil Rights 1992), to find that the city's failure to provide health benefits to same-sex partners of employees violated the city's ordinance forbidding discrimination on the basis of affectional preference. *Id.* at 13. *But see Phillips v. Wisconsin Personnel Comm'n*, 482 N.W.2d 121 (Wis. 1991) (state's failure to provide health insurance benefits to partner of lesbian employee held not discriminatory on basis of sexual orientation or gender and not equal protection violation). Disparate impact analysis may be a promising approach to pursue in legal challenges to the retirement allowance beneficiary provisions.

90. MASS. GEN. L. ch. 32, § 12(2) Option (c) (1992).

91. See Memorandum from John J. McGlynn, Commissioner of Division of Employee Retirement Administration, to All Retirement Boards (Apr. 24, 1991) (on file with author).

92. MASS. GEN. L. ch. 32, § 12(2) Option (d) (1992). See *infra* text accompanying notes 124-32.

bers.⁹³ Upon close examination, however, it becomes clear that the retirement allowance beneficiary list is not about providing for dependents. A member could leave his or her pension to an adult millionaire sister, for example. Using a blood relationship as a surrogate for dependency determinations is not even rational.⁹⁴

Moreover, although members may have actual dependents who do not fall within the allowed class, there is no latitude for case-by-case determinations in this context. Indeed, the statutory list seems to be based on a concept of family that statistics show is becoming less and less common.⁹⁵ Often, in today's two-earner households, relationships between adults are of interdependence, and not of one-way dependence.⁹⁶ If the goal of the retirement system is to promote caring for actual dependents, perhaps the retirement allowance beneficiary list should be changed by allowing the Board the discretion to determine whether a person with whom a member has a relationship is truly financially dependent.⁹⁷

The retirement allowance beneficiary restrictions may be defended as a bright-line means of reflecting the emotional attachments of the majority of members, and allows those members to provide for those to whom they are emotionally attached. Yet, the list may not accurately reflect the relationships of many members at all. Some people are estranged from their legally-recognized families and it would be highly unlikely that they would wish to provide a benefit to those families. If the goal is to allow members to designate as a beneficiary a person to whom they are emotionally attached, regardless of dependence, the list should be revised to permit the designation of persons beyond those currently listed.

It may also be argued that the Joint and Last Survivor Allowance,⁹⁸ which allows a member to provide to a beneficiary an allowance during the beneficiary's lifetime, is more expensive for the Commonwealth and should therefore be more limited than other options. This analysis is inaccurate, however, because the three options contained in section 12(2)⁹⁹ are actuarially equivalent,¹⁰⁰ or designed to cost the public employer the same amount.¹⁰¹ For example, the amount received by

93. See *supra* note 11 and accompanying text, and *infra* text accompanying note 117.

94. See *infra* note 112.

95. See *supra* notes 1 and 4.

96. BERGMANN, *supra* note 1, at 26-38.

97. See *infra* note 122.

98. MASS. GEN. L. ch. 32, § 12(2) Option (c) (1992).

99. The Life Annuity Option, the Cash Refund Annuity Option, and the Joint and Last Survivor Allowance Option.

100. MASS. GEN. L. ch. 32, § 12(2) Option (c) (1992).

101. See *supra* note 65.

the employee and her beneficiary under the Joint and Last Survivor Allowance is adjusted according to the age of the employee and the age of the beneficiary to be actuarially equivalent to the Life Annuity option.¹⁰² Thus, there appears to be no fiscal justification for the beneficiary limitations on the Joint and Last Survivor Allowance.

Next, it may be argued that the Commonwealth has an interest in promoting "traditional" nuclear families because such units are deemed the best setting in which to raise children.¹⁰³ Even assuming this conclusion is correct,¹⁰⁴ the retirement allowance beneficiary list does not promote such families, since it includes adult siblings, ex-spouses, and parents who may not be involved in any way with the member's household unit or with child-rearing.

The retirement statute arguably treats members who have responsibilities and personal lives that do not fit within the statute and who wish to designate beneficiaries to reflect their responsibilities and lives, in a similar fashion to those who have been convicted of a "criminal offense involving violation of the laws applicable to [their] office or position."¹⁰⁵ Employees convicted of such offenses can designate that return of contributions be made to a beneficiary of their choice, but forfeit any interest otherwise received.¹⁰⁶ Such employees also forfeit their retirement allowance.¹⁰⁷ Loyal employees, who have not been convicted of any offense, and who wish to provide benefits to someone outside the rigid beneficiary list can only designate return of their own

102. Thus, while a member may designate a very young beneficiary to receive the Joint and Last Survivor Allowance, the annual amount received by the beneficiary will be less than that which would be received by an older beneficiary. MASS. GEN. L. ch. 32, § 12(2) Option (c) (1992).

103. The Massachusetts Supreme Judicial Court recently held in the context of adoption, that the "best interests of the child" is the governing principle and that adoption by a lesbian co-parent of her partner's child is appropriate if in the best interests of the child. *Adoption of Susan*, 416 Mass. 1003, 1003, 619 N.E.2d 323, 324 (1993); *Adoption of Tammy*, 416 Mass. 205, 210-17, 619 N.E.2d 315, 318-21 (1993).

104. Interestingly, the City of Boston's Executive Order entitled "Extension of Certain Personnel Benefits," February 12, 1993, indicates that the City has an interest in promoting bonds within all types of families. It states: "The City recognizes that the welfare of all residents is enhanced by efforts to reinforce the bonds of families, both traditional and non-traditional, and encourages individuals to provide emotional, economic, and social support within households[.]" See *infra* text accompanying notes 135-36.

105. MASS. GEN. L. ch. 32, §§ 12(2)(c), (d), 15(4) (1992).

106. MASS. GEN. L. ch. 32, § 15 (4) (1992).

107. *Id.* The statute does not define offenses pertaining to an employee's office. A prominent current case pertaining to this issue is *MacLean v. State Bd. of Retirement*, No. 93-33cv1203 (D. Mass. filed Oct. 12, 1993), in which former Massachusetts state representative William Q. MacLean is challenging the Retirement Board's decision terminating his retirement allowance because of his conviction on conflict of interest charges.

contributions, plus interest, to a beneficiary.¹⁰⁸ They cannot provide any of their retirement allowance to a person not listed in the statute. The primary difference is that the loyal employee is permitted to direct his or her other contributions plus interest to the recipient of his or her choosing, while the convicted employee is allowed to designate the recipient of his or her contributions only (without interest).

Further, it is incongruous that a member may designate a former spouse to receive the Joint and Last Survivor's Allowance, while a gay or lesbian member in an intact, flourishing, long-term relationship cannot designate his or her partner to receive the allowance. This outcome contravenes principles of individual consideration of circumstances found elsewhere in the statute.¹⁰⁹

The limitations on choice of beneficiary also force those with responsibilities and personal lives that do not conform to the statute's structure to deny those connections, e.g., to take the full annuity allowance,¹¹⁰ or to provide minimal or no support to their loved one.¹¹¹ The employee in a lifelong, but legally unrecognized, relationship is denied the opportunity to take a lesser allowance during his or her lifetime in order to provide the Joint and Last Survivor Allowance to a partner.¹¹² In sum, the retirement allowance beneficiary provisions make very little, if any sense. They do not save the Commonwealth money. They do not further any coherent goal. Their restric-

108. MASS. GEN. L. ch. 32, § 11(2) (1992). Note that this only applies if any employee dies before retirement; if he dies after retirement, the designated survivor only receives the remainder of the member's contributions, if any. MASS. GEN. L. ch. 32, § 12(2) Option (b) (1992).

109. See *infra* text accompanying notes 116-32.

110. MASS. GEN. L. ch. 32, § 12(2) Option (a) (Life Annuity) (1992). See *supra* text accompanying note 51.

111. MASS. GEN. L. ch. 32, § 12(2) Option (b) (Cash Refund Annuity) (1992). See *supra* text accompanying notes 52-55, 62-63.

112. MASS. GEN. L. ch. 32, § 12(2) Option (c) (1992). The retirement allowance beneficiary provisions, as discussed above, limit gay and lesbian employees' rights to provide for their partners or former partners while allowing married and divorced heterosexual employees to provide for their spouses or former spouses. Challenges under the Equal Protection Clause of the United States Constitution and under Part I, article 10 of the Massachusetts Constitution are worth considering. Most courts have applied rational basis scrutiny to equal protection claims of lesbians and gay men. Patricia A. Cain, *Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1551, 1620 n.368 (1993). As the discussion *supra* at text accompanying notes 60-112 has shown, the provisions are not reasonably tailored to any legitimate goal. They are not aimed at supporting members' family units (former spouses can be designated, see *supra* text accompanying notes 90-92), they are not aimed at supporting dependents of members (non-dependent parents and siblings can be designated, see *supra* text accompanying notes 93-95), other persons who may be actual dependents cannot be designated (see *supra* text accompanying notes 95-97), and its limitations do not save the state any funds (see *supra* text accompanying notes 98-102).

tions prevent employees from providing for actual dependents and loved ones after their own deaths.

IV. STATUTORY DEFINITIONS OF DESERVING SPOUSES

In several portions of the retirement statute, discussed in this part, the marital status of a retirement system member is a critical factor in determining whether a surviving spouse is entitled to benefits, but it is not the *sole* determinant. Several sections provide that the surviving spouse of a deceased member may not be able to receive benefits if the spouse did not live with the member at the time of the member's death, remarries, or if the Board finds that the spouse engaged in certain reprehensible conduct.¹¹³ The duration, nature, and state of the relationship at the time of the member's death is in some circumstances taken into account.¹¹⁴ Given that the statute considers the substance of the marital relationship in determining whether a surviving spouse receives certain benefits, it is inconsistent to deny all benefits to the surviving partners of gay, lesbian, or unmarried heterosexual members without considering the duration, nature, and state of their relationships.¹¹⁵

A. *Accidental Death Benefit*

The retirement statute provides for an accidental death benefit, which is neither a pension nor annuity benefit, for any member who dies as the result of a personal injury sustained or a hazard undergone while in the performance of official duties.¹¹⁶ This payment is made automatically according to the recipient scheme set forth in the statute; members do not designate beneficiaries in this context. The theme of providing for employees' dependents is most emphasized in the provisions pertaining to accidental death benefits.¹¹⁷

The statute directs death benefits to be paid to a surviving spouse for as long as the spouse survives and does not remarry. To be eligible

113. MASS. GEN. L. ch. 32, §§ 9 (2)(a), (b), 12(2) Option (d) (1992). See *infra* text accompanying notes 116-132.

114. See *infra* text accompanying notes 116-32.

115. See *supra* text accompanying notes 60-112, and *infra* text accompanying notes 116-32.

116. MASS. GEN. L. ch. 32, § 9(1), (2)(a) (1992).

117. See *supra* text accompanying note 11, and *supra* text accompanying note 93. This is true in other New England states' retirement laws, where accidental death benefits generally go automatically to a surviving spouse, children, and other relatives. See, e.g., R.I. GEN. LAWS § 36-10-20 (1990); N.H. REV. STAT. ANN. § 100-A:8 (1990); ME. REV. STAT. ANN. tit. 5, § 18003 (West 1989). Vermont's public retirement statutes provision on accidental death benefits states it shall be paid to the "dependent beneficiary" or "dependent spouse" of the member, but it does not define the term "dependent." VT. STAT. ANN. tit. 3, § 465 (a), (b) (1985).

under this provision, however, the couple must have been living together¹¹⁸ at the time of the member's death for the surviving spouse to receive the allowance.¹¹⁹ Alternatively, the spouse may receive the benefit if the Board finds that the couple had been living apart at the time of the member's death because of the member's desertion of such spouse.¹²⁰ Given these beneficiary provisions, it is puzzling that the statute forces a benefit to be paid to a surviving spouse who the member abandoned, since the member would presumably not want the survivor to receive any benefits.¹²¹ The benefit also terminates upon remarriage and is thus based on the assumption that marriage involves support and that a remarried spouse no longer needs or deserves such support.¹²² If the couple was living apart at the time of the member's death because the spouse had abandoned the member, presumably the spouse would

118. For discussion of what constitutes "living together" for purposes of Massachusetts General Law Chapter 32, § 12(2)(d), see *Donnelly v. Contributory Retirement Appeals Bd.*, 15 Mass. App. Ct. 19, 443 N.E.2d 416 (1982), discussed *infra* note 126.

119. MASS. GEN. L. ch. 32, § 9(2)(a), (b) (1992).

120. MASS. GEN. L. ch. 32, § 9(2)(a) (1992).

121. This illustrates the dominance of the concept of dependence in this section of the statute. For, even if the member had deserted the spouse because the spouse was engaging in moral turpitude, or for some other "justifiable cause," the accidental death benefits are paid to the spouse. See MASS. GEN. L. ch. 32, § 12(2) Option (d), and *infra* text accompanying notes 112-13 (1992). The statute assumes the spouse is dependent on the member and therefore worthy of support.

122. Underscoring the equation of marriage with support is the provision pertaining to disposition of the benefits if there is no eligible surviving spouse. In such instances, the benefit is paid to a guardian for the benefit of any children who are under eighteen years of age and unmarried or who were over eighteen and incapacitated from earning on the date of the member's death. MASS. GEN. L. ch. 32, § 9(2)(b) (1992). It should be noted that permission of the probate court and the parent or guardian of a minor wishing to marry is necessary before a minor is permitted to marry. MASS. GEN. L. ch. 207 §§ 25, 33 (1992). Section 9(b) means that if a surviving child under eighteen marries, the benefit terminates. Once a child is over eighteen, the benefit terminates whether the individual is married or not.

The benefit provisions continue for a variety of situations. If there is no eligible surviving spouse or child, it shall be paid to the:

surviving totally dependent father or mother of such member...then to any totally dependent unmarried or widowed sister of such member with whom he was living at the time of his death, so long as such beneficiary or beneficiaries survive, do not marry or remarry, and are unable to support themselves.

MASS. GEN. L. ch. 32, § 9(c) (1992).

The board is to decide all questions relating to dependency. MASS. GEN. L. ch. 32, § 9(3)(a) (1992). While the provision does not even contemplate the possibility that a brother could be totally dependent, the statute has been construed to allow benefits to a totally dependent brother. *Flanagan v. Dedham Retirement Board, Division of Administrative Law Appeals*, No. 8995 (Mar. 13, 1986) (on file with author).

not receive the benefit.¹²³ The accidental death benefits provisions are an example of marriage used as a necessary but not sufficient condition for payment of benefits to the surviving spouse of an employee, as various conditions must be satisfied before payment is made.

B. *Member Survivor Allowance*

The "Member Survivor Allowance," previously discussed,¹²⁴ allows the surviving spouse of a member who dies before retirement to elect to receive a survivor's share amounting to two-thirds of the member's retirement allowance if the member had not designated a beneficiary other than the spouse.¹²⁵ To receive this allowance, however, the spouse must have been married to the member for more than a year and the couple must have been living together at the time of death.¹²⁶ If they were living apart, the Board must find that they were living apart for "justifiable cause other than desertion or moral turpitude on the part of the [surviving] spouse" in order to award these benefits.¹²⁷

This provision also illustrates the use of marriage as an important, but not exclusive, factor in the allocation of benefits. The one-year rule

123. MASS. GEN. L. ch. 32, § 9(2)(a) (1992).

124. See *supra* text accompanying notes 40-41, 43-45; *supra* chart accompanying notes 66-75.

125. MASS. GEN. L. ch. 32, § 12(2) Option (d) (1992). Section 12(B) also provides for an allowance where a member who has two years creditable service under the circumstances in which a surviving spouse can elect to receive a survivors' allowance, see *supra* note 40 and *infra* text accompanying notes 126-32, and an additional allowance is paid to the surviving spouse for the benefit of the children. MASS. GEN. L. ch. 32, § 12B (1992). The couple must have been living together at the time of death, and if living apart the cause must not be moral turpitude of the surviving spouse. *Id.*

126. MASS. GEN. L. ch. 32, § 12(2) Option (d), 12B (1992). See *Donnelly v. Contributory Retirement Appeals Bd.*, 15 Mass. App. Ct. 19, 443 N.E.2d 416 (1982). In *Donnelly*, the Appeals Court held that a husband and wife were "living together" at the time of the member-wife's death, so that the husband was entitled to claim the allowance, overturning the Board's determination that they had not been "living together" under the statute, and overriding the wife's choice of her children as named beneficiaries of her contributions. *Id.* at 24, 443 N.E.2d at 419. At the time of the member-wife's death by suicide, the husband was out of town on a short trip, and the wife had begun moving out of the house but was prevented from doing so completely by a storm. *Id.* at 21, 443 N.E.2d at 417. Where the parties had not established separate residences, the court held that they were living together at the time of the wife's death. *Id.* at 21-24, 443 N.E.2d at 417-19. The consequence was that the children were denied the return of their mother's contribution and the husband received the Member Survivor Allowance. *Id.* at 19, 443 N.E.2d at 419.

127. MASS. GEN. L. ch. 32, § 12(2)(d) (1992). See *infra* notes 128-31. The emphasis on desertion is interesting in view of the concomitant emphasis elsewhere in the statute on dependence. See MASS. GEN. L. ch. 32, § 9(a) (Accidental Death Benefits) (1992). See *supra* text accompanying notes 116-23. Moral turpitude, however, seems not to be related to dependence. See *infra* text accompanying notes 128-30.

forbidding the spouse from electing to receive benefits if the parties were married less than a year ensures that a couple will not marry at the last minute before a member dies so that benefits can be passed on to a "sham" spouse.

Moreover, if the parties had been married for twenty years but were living apart at the time of death, the surviving spouse will not necessarily receive the allowance. In such circumstances, the survivor does not automatically receive the allowance, but can only receive it if the Board finds that, although they were living apart, the survivor did not desert the member or engage in moral turpitude,¹²⁸ and the separation was justifiable.¹²⁹ This seems to have the purpose of insuring that a non-deserving spouse, e.g., a spouse who had deserted the innocent member, should not receive the benefit. Similarly, where a separation was precipitated by the survivor's moral turpitude, the survivor should not be able to elect to receive the benefit.¹³⁰ Only if a separation is for "justifiable cause," as determined by the Board,¹³¹ can a surviving spouse married to a deceased member for more than one year elect to receive the benefit. The statute thus "weeds out" the undeserving surviving spouse, rather than making the bright-line legal issue of marriage the only factor relevant in being able to elect to receive the share.¹³²

128. There is no clear definition of "moral turpitude" under Massachusetts law. In *Essex County Retirement Bd. v. Contributory Retirement Appeals Bd.*, 342 Mass. 322, 324, 173 N.E.2d 627, 629 (1961), the court assumed that bribery and larceny constituted moral turpitude. The term has interesting connotations: In *Nemetz v. INS*, 485 F. Supp. 470 (E.D.Va. 1980), a district court found that an immigrant's involvement in a long-term homosexual relationship constituted moral turpitude and demonstrated the immigrant's bad moral character so as to mandate his exclusion. This finding was reversed on appeal. *Nemetz v. INS*, 647 F.2d 432 (4th Cir. 1981). The phrase recurs in the context of whether a surviving spouse can elect to receive a survivor's allowance; if the spouses are living apart because of moral turpitude on the part of the survivor, the survivor cannot receive the allowance. MASS. GEN. L. ch. 32, §§ 12(2) Option (d), 12B (1992).

129. MASS. GEN. L. ch. 32, § 12 Option (d) (1992).

130. The "moral turpitude" phrase is repeated in MASS. GEN. L. ch. 32, § 10. See *supra* note 128 and accompanying text.

131. According to the *Donnelly* Court, "justifiable cause" is a "term of art" in domestic relations law. *Donnelly v. Contributory Retirement Appeals Bd.*, 15 Mass. App. Ct. 19, 22, 443 N.E.2d 416, 418 (1982).

132. This "weeding out" is similar to, although broader than, the spouse's forced share in the context of wills, where a court may make a determination, prior to the death of the decedent, that will prohibit a spouse from claiming a forced share. See MASS. GEN. L. ch. 191, § 15 (1992) & MASS. GEN. L. ch. 209, § 36 (1992) (providing that a probate court may enter a judgment that a person has been deserted by his or her spouse or is living apart from such person's spouse for justifiable cause, and in such an instance the surviving spouse may not claim a forced share).

V. PROPOSALS FOR CHANGE

A. *Introduction*

This article has described the rigid statutory limitations on retirement allowance beneficiaries and discussed several scenarios in which such limitations may deny deserving members the opportunity to designate as beneficiaries those to whom they are responsible and emotionally attached. This article has also contrasted the rigid rules pertaining to designating beneficiaries with other provisions of the retirement statute. These other provisions, such as accidental death benefits, embody the ideas that rigid categories such as marital status should not be the sole criterion on which to base entitlement to retirement benefits and that other factors, such as emotional and financial dependence and the nature of the subject relationship, should be important in certain contexts. Similarly, entitlement to a portion of an employee's retirement allowance should not turn solely on marital status, which can deny loyal employees opportunities they have earned. Rather, the statute should be revised to more fairly and accurately reflect the realities of the diverse families of public employees.

This article will now propose several simple changes in the statute which would make it more consistent and fair to all employees. The changes proposed will not significantly increase costs or administrative burdens on the Commonwealth.

B. *Specific Proposals*

1. Allowing a Member to Designate His or Her Domestic Partner as a Recipient of the Joint and Last Survivor and Member Survivor Allowance

The beneficiary provisions for the Joint and Last Survivor and Member Survivor Allowances beneficiary list should be amended to reflect the values of both supporting dependents of members and enabling members to provide support for those to whom they are emotionally attached.¹³³ To accomplish this goal, each member should

133. One possibility for change would be to eliminate the limitations of sections 12 Option (c) and 12 Option (d) on designation of beneficiaries for survivor allowances. This would allow a member to designate anyone as a beneficiary. As discussed in notes 14 and 76 above, the other New England states do not contain comparable limitations on beneficiaries, and employees can designate whomever they wish to receive retirement benefits after their deaths. Since the various options are actuarially equivalent, it can be argued that it should not matter at all who can be beneficiaries. The administrative simplicity of eliminating limitations on who can receive the Option (c) allowance is very appealing. However, such an amendment

have the option of designating a "domestic partner" to receive his or her survivor's benefits.

Both public and private employers are increasingly providing some of the same employment benefits to "domestic partners" of employees that they provide to legal spouses. Massachusetts Governor William Weld, in a 1992 Executive Order, extended the benefits of bereavement and sick leave for state employees in a "relationship of mutual support" with another person so that an employee whose domestic partner had died could take off time from work.¹³⁴ In 1993, former City of Boston

would not reduce the inequities regarding the Member Survivor Allowance or Accidental Death Allowance, and a domestic partner requirement could do so.

134. Exec. Order No. 340, *reprinted in* Report to Governor, Governor Weld's Executive Order 340, entitled "Providing for Non-Discriminatory Benefit Policies for Employees of the Commonwealth," provides as follows:

Whereas, Chapter 151B of the Massachusetts General Law established the obligation of the Commonwealth to protect its citizens from discrimination on the basis of sexual orientation; and Whereas, the Commonwealth recognizes its responsibility to take measures to ensure that its official employment policies are in harmony with the established obligations of Chapter 151B; Now, Therefore, I . . . do hereby order as follows:

1. For purposes of this executive order, "relationship of mutual support" means a relationship between two individuals, each unmarried and competent to contract, characterized by mutual caring and emotional support; an agreement to share basic living expenses; a sharing of living quarters and an intent to do so indefinitely; a mutual assumption of responsibility for each other's welfare; and a mutual expectation that the relationship is exclusive and will endure over time.

2. The Department of Personnel Administration shall, no later than November 1, 1992, promulgate such regulations and policies as are necessary to eliminate discrimination on the basis of sexual orientation in the benefits provided to employees under its jurisdiction. Benefits shall include the following:

a. An employee of the Commonwealth shall be entitled to a maximum of four calendar days of paid "bereavement" leave, upon the death of a family member or of a person with whom the employee has a relationship of mutual support.

b. An employee of the Commonwealth shall be allowed to use up to 10 days of accrued sick leave in the event of the serious illness of a family member or of a person with whom the employee has a relationship of mutual support.

3. An employee of the Commonwealth claiming leave benefits on account of the illness or death of a person with whom the employee has a relationship of mutual support must, as a condition of receiving such leave benefits, certify to the Department of Personnel Administration the existence of his or her relationship of mutual support.

Mayor Raymond Flynn extended certain personnel benefits to "domestic partners and other household members" of city of Boston employees.¹³⁵ The cities of Cambridge and Brookline have each passed domestic partnership ordinances within the last year.¹³⁶ Also within the last year, Clark University, Harvard University, the Massachusetts Institute of Technology, and Wellesley College have all put in place domestic partnership policies that provide a range of benefits to domestic partners of employees.¹³⁷

Numerous entities, including a federal agency (the Department of Housing and Urban Development),¹³⁸ various municipalities,¹³⁹ one state (Illinois),¹⁴⁰ and many private companies, including Levi-Strauss¹⁴¹ and Lotus Development,¹⁴² have instituted some types of

135. Boston Mayor Raymond L. Flynn, Executive Order, *Extension of Certain Personnel Benefits* (Feb. 12, 1993). The executive order did not define "domestic partners", but included "domestic partners" in the definition of "household members." *Id.* ¶ 1. "Household members" was defined simply as persons who currently reside in the household of a city employee and have shared their principal domicile for not less than the past year with a City employee. *Id.* The order extended sick, bereavement and family leave to household members of city employees and directed certain city agencies to explore appropriate family and medical leave policies to address all provisions of the executive order.

136. Christopher Mutler, *Brookline Adopts Domestic Partners Proposal*, BAY WINDOWS, June 10, 1993, at 1; CAMBRIDGE, MASS., MUN. CODE ch. 2, § 119 (1992); Town of Brookline, Final Vote to Amend the Town ByLaws (June 2, 1993) (on file with author).

137. Clark University, Proposed Policy for Extension of Benefits to Domestic Partners not Legally Allowed to Marry under Massachusetts Law (Apr. 1993) (on file with author); Memorandum from Joan F. Rice, Director of Personnel, Massachusetts Institute of Technology, to Members of the MIT Community (Apr. 28, 1993) (on file with author); Memorandum from Molly Ambrose Ostwald, Director of Personnel, Wellesley College, to Members of the Wellesley College Faculty and Staff (June 7, 1993) (on file with author). See Jordanna Hart, *Benefits at Harvard to cover gay partners*, BOSTON GLOBE, May 21, 1993, at 17.

138. *Legislative & Political Updates*, LESBIAN/GAY LAW NOTES, Apr. 1993, at 26 (U.S. Department of Housing and Urban Development puts into effect a domestic partner family leave program).

139. See, e.g., *Legislative Updates*, LESBIAN/GAY LAW NOTES, Nov. 1992, at 79 (Sacramento adopts domestic partner registration ordinance); LESBIAN/GAY LAW NOTES, June 1993, at 63 (Minneapolis). See *infra* note 143.

140. *Legislative Updates*, LESBIAN/GAY LAW NOTES, Nov. 1991, at 49 ("Illinois Senate has passed a bill allowing hospital patients to designate whom they won't allow to visit them, a sort of mini-domestic partner bill.").

141. *Levi Strauss, Princeton, Join Domestic Partnership Ranks*, LESBIAN/GAY LAW NOTES, Apr. 1992, at 29.

142. *Domestic Partnership Cause Advances*, LESBIAN/GAY LAW NOTES, Oct. 1991, at 67 (Lotus will offer health and other benefit coverage to domestic partners of gay employees).

domestic partnership benefit policies.¹⁴³ While it does not appear that domestic partnership principles have yet been applied to any retirement systems, it is unclear whether such a proposal has been made.¹⁴⁴ Massachusetts thus has an opportunity to be a national leader in this area.

Governor Weld's Executive Order 340 defines a "relationship of mutual support" in a manner that could be applied in other contexts with slight modifications. The order defines a "relationship of mutual support" as, "[a] a relationship between two individuals, [b] each unmarried and competent to contract; [c] characterized by mutual caring and emotional support; [d] an agreement to share basic living expenses; [e] a sharing of living quarters and an intent to do so indefinitely; [f] a mutual assumption of responsibility for each other's welfare; and [g] a mutual expectation that the relationship is exclusive and will endure over time."¹⁴⁵ The existing policy is administered by the Department of Personnel Administration, which has prepared a form entitled "Certification of Relationship of Mutual Support" which repeats the above definition and leaves blanks for the employee to verify that he or she is "committed to a relationship of mutual support under the terms of Executive Order 340."¹⁴⁶

The retirement statute should be amended to provide for members to designate a "domestic partner" or "person with whom said member is in a relationship of mutual support" to receive benefits under the

143. See Craig A. Bowman & Blake Cornish, *A More Perfect Union: A Legal and Social Analysis of Domestic Partner Ordinances*, 92 COLUM. L. REV. 1164 (1992); Elbin, *supra* note 5, at 1068. In Berkeley, California, believed to be the first city to extend health plan benefits to domestic partners, unmarried couples must file an Affidavit of Domestic Partnership stating that they have lived together for at least six months and "share common necessities of life." *Id.* at 1072. In Santa Cruz, California, which also extends health benefits to domestic partners, the policy states that if the employer or company suffers any loss because of a false statement in an Affidavit of Domestic Partnership, the employer or company may sue for their losses, including attorneys fees. *Id.* at 1073. The Santa Cruz policy also provides that the persons must be at least eighteen and not related close by blood than would prevent them from marrying in California. *Id.* Some private employers' domestic partnership policies, e.g., that of Lotus Development, have applied only to gay and lesbian employees, based on the reasoning that heterosexual employees can get married and take advantage of spousal benefits while gay or lesbian employees cannot. All governmental domestic partnership policies of which this writer is aware, apply to all employees regardless of sexual orientation.

144. In researching this article, the author has found no published articles pertaining to this issue.

145. Exec. Order No. 340, *supra* note 134, ¶ 1.

146. Memorandum from Robert C. Dumont, Personnel Administrator to Cabinet Secretaries and Agency Heads, Oct. 30, 1992 (on file with author). The form is identified as confidential. It does not name the person with whom the employee is in a Relationship of Mutual Support. See *id.*

Member Survivor Allowance if the employee dies before retirement,¹⁴⁷ and the Joint and Last Survivor Allowance if the employee dies after retirement.¹⁴⁸ The operable requirements could contain the elements in Governor Weld's definition: (1) the member must be unmarried and in a relationship with an individual who is unmarried; (2) the member and the person with whom he is in a relationship must be competent to contract; (3) the relationship must be characterized by mutual caring and emotional support; (4) the persons in the relationship must have agreed to share basic living expenses; (5) the persons in the relationship must be living together and intend to do so indefinitely; (6) they must mutually assume responsibility for each other's welfare; and (7) they must mutually expect that the relationship is exclusive and will endure over time.¹⁴⁹

Members seeking to designate a beneficiary under the amended provision could be required to execute an affidavit attesting to the above elements of the relationship.¹⁵⁰ The affidavit would be kept confidential¹⁵¹ and should name the domestic partner, as it is after all a designation of beneficiary form. If the designation is later challenged, the Board will determine the validity of the designation. As this article has shown, the retirement statute already provides for numerous situations in which the Board may have to make factual determinations,¹⁵² so a new responsibility should not be a significant burden on the Board.

147. MASS. GEN. L. ch. 32, § 12(2) Option (d) (1992).

148. *Id.*

149. See Exec. Order No. 340, *supra* note 134.

150. It should be noted that this involves a significantly greater degree of intrusion into the relationship of the individuals involved than is currently the case under the Joint and Last Survivor Allowance of § 12(2) Option (c). For example, if a person designates his spouse to receive survivor benefits under Option (c), the spouse automatically can receive the benefits regardless of whether the parties even live together or whether the parties' relationship is characterized by mutual support and caring, or whether the relationship is exclusive. See Mary Ann Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643, 1664-66 (1993). In addition, the affidavit would give local retirement boards significant private information about members. This is an argument for simply eliminating all limitations on choice of beneficiaries for section 12(2) Option (c). See *supra* note 133.

151. Any such affidavit would contain personal data and should be protected from disclosure under the public records law. MASS. GEN. L. ch. 4, § 2 (cl. 26(c)) (1992). However, complete protection of the material would be difficult to ensure.

152. See, e.g., MASS. GEN. L. ch. 32, § 12(2)(d) (1992). Under this provision, for example, if a member has not designated a spouse as a beneficiary, the spouse and member were not living together at the time of the member's death, and the spouse elects to obtain survivor benefits, the Board decides if the separation was justifiable or not. Under Massachusetts General Laws Chapter 32, § 9(3)(a) (1992), the Board would decide whether a widowed sister who lived with a member who died from an accident at work, is totally dependent upon him. See *id.* § 12(2)(d). See *supra* note 122.

While Governor Weld's Executive Order does not deal with situations in which a domestic partnership has ended, other policies have dealt with that issue. The University of Chicago, which provides health coverage and other benefits for domestic partners,¹⁵³ uses a form entitled "Statement of Termination of Domestic Partnership" which treats such a termination as equivalent to a divorce, terminating items such as library privileges but allowing the ex-domestic partner to continue health insurance benefits for thirty-six months after termination.¹⁵⁴ In the retirement context, a similar form could be drafted that would terminate the designation of the beneficiary.¹⁵⁵

These provisions would establish a clear standard for determining whether a person with whom a member lived and had a relationship was the member's "domestic partner." The Board would not be required to become involved in individual determinations except in extraordinary circumstances.

It should be emphasized that this statutory change should not cost the Commonwealth any additional funds because all of the options

153. The University of Chicago, Personnel Policy Guidelines, § U401.01 (Jan. 11, 1993) (on file with author).

The University of Chicago defines "domestic partnership" as:

two individuals of the same gender who live together in a long-term relationship of indefinite duration, with an exclusive mutual commitment in which the Partners agree to be jointly responsible for each other's common welfare and share financial obligations. The Partners may not be related by blood to a degree of closeness which would prohibit legal marriage in the state in which they legally reside.

University of Chicago, Office of Staff Benefits, Questions and Answers for Domestic Partnerships (Jan. 15, 1993) (on file with author). The University requires both members of the domestic partnership to sign a statement certifying that they fall within the above definition. In the section where the partners certify that they are jointly responsible for each other's common welfare and share obligations, the statement provides that such joint responsibility:

may be demonstrated by the existence of three of the following. We have circled below the types of documentation that we can provide if requested. [a] Domestic Partnership Agreement[;] [b] Joint mortgage or lease[;] [c] Designation of domestic partner as beneficiary for life insurance and retirement contract[;] [d] Designation of domestic partner as primary beneficiary in . . . will[;] [e] Durable property and health care powers of attorney[;] [f] Joint ownership of motor vehicle, joint checking account, or joint credit account.

University of Chicago, Office of Staff Benefits, Statement of Domestic Partnership, Questions and Answers on Domestic Partnerships (Jan. 15 1993) (on file with author).

154. *Id.* ¶ 4.

155. If a member had informed the Board that the relationship was over, the former domestic partner could not claim the Member-Survivor Allowance under section 12(2) Option (d). See *supra* text accompanying notes 40, 124-32.

under section 12(b) are actuarially equivalent.¹⁵⁶ Employees who currently have "domestic partners" have simply been forced to choose other options basically equivalent in cost to the state.¹⁵⁷

2. Allowing a Domestic Partner to Elect to Receive the Member Survivor Allowance in the Same Circumstances in which a Spouse May Do So

The current retirement statute provides that a member's surviving spouse can elect to receive the Member Survivor Allowance, so long as the member has not already designated someone else and certain other requirements are met.¹⁵⁸ Given the proposed requirements for domestic partnership, a domestic partner should be able to elect to receive a survivor's allowance—as long as the member has not designated someone else. This latter supposition, however, could create the administrative problem of a person or persons claiming, after a member's death, to have been the domestic partner of the deceased employee. This benefit perhaps should not be implemented until the proposed changes to retirement allowance beneficiary provisions are in effect for some time. Perhaps regulations could be promulgated that establish what a person claiming the benefit would need to prove in order to prevail. Examples might include registration as a domestic partner with the decedent under a local ordinance, joint ownership of assets, and other factors.¹⁵⁹ If the parties were living together at the time of the member's death, and the survivor can establish that he or she was the domestic partner of the decedent, then the partner should be able to elect to obtain the benefit. If the parties were not living together at the time of the member's death, the Board must find that they were

156. See *supra* text accompanying notes 65, 98-102.

157. Because principles of fairness are involved, the fact that this proposal might cost the Commonwealth slightly more to administer the retirement system by including domestic partnership survivor allowances should not be fatal. See Report from Stanford University's Subcommittee on Domestic Partners' Benefits, June 1992, § 3 (on file with author).

158. See *supra* text accompanying notes 40, 124-32. The requirements include that the spouse and member must have been married for at least a year and must have been living together at the time of the member's death. MASS. GEN. L. ch. 32, §§ 12(2)(c), 12B (1992). If they were not living together at the time of the member's death, the Board must conclude that they had been living apart for "justifiable cause other than desertion or moral turpitude on the part of the [surviving] spouse" for the benefits to be provided. MASS. GEN. L. ch. 32, § 12(2)(d) (1992).

159. For example, the University of Chicago policy discussed above contains a list of a number of objective criteria designed to determine the existence of a domestic partnership, such as joint property ownership, designation of each other as primary beneficiary in wills, designation of each other as power of attorney, and so forth. See *supra* note 153.

living apart for a justifiable cause other than desertion on the part of the surviving domestic partner.¹⁶⁰

3. Allow Domestic Partners to Receive Accidental Death Benefits in the Same Circumstances in Which Spouses May Receive Such Benefits

Given the requirements for a relationship to be considered a domestic partnership as outlined above, it is reasonable to apply generally the same standards to the receipt of accidental death benefits by spouses as by domestic partners.¹⁶¹ This is particularly true when one considers that the definition of domestic partner contained in this article is more closely tailored to that of a relationship of actual dependence or interdependence than that contained in the existing statute. A spousal relationship does not necessarily include all of the elements required for a nonspousal couple to meet the definition of "domestic partner."¹⁶² The benefits would be paid to the surviving spouse or domestic partner who had been designated as the beneficiary under the Joint and Last Survivor and Member Survivor Allowance provisions. That person would receive the benefits provided that the couple had been living together at the time of the member's death, or if the Board finds that the couple had been not living together at the time of the member's death due to the desertion of such domestic partner by the member.¹⁶³ The benefit could be extended to an individual designated by a member before death as a domestic partner and eventually to a person who could establish the existence of a domestic partnership at the time of death.¹⁶⁴ The benefit should terminate if a surviving domestic

160. MASS. GEN. L. ch. 32, § 12(2) Option (d) (1992). See *supra* text accompanying notes 126-30. This provision should not involve the Board in burdensome factual determinations any more than the existing statute does, in circumstances where the member has not designated anyone, the couple was living apart, and the surviving member of the couple claims to be entitled to the allowance. See *supra* text accompanying notes 125-28. It is not suggested that the phrase "moral turpitude" be included in these amendments, indeed perhaps it should not be included in the statute. As noted above, the statute contains several contexts in which the phrase "moral turpitude" appears, but nowhere is the term defined.

161. See *supra* text accompanying notes 116-23.

162. See *supra* text accompanying notes 150-51.

163. See *supra* text accompanying notes 116-23.

164. Generally, an employee who has a domestic partner and wishes to provide for him or her will hopefully fill out the appropriate beneficiary form. In the context of "accidental death benefits," which are paid automatically to the member's spouse if they were living together, § 9(1), even if the member had not filled out any beneficiary form under § 12(2) Option (c), it is important to provide the opportunity for a surviving domestic partner to establish the existence of the relationship for purposes of the accidental death provisions since no opportunity for automatic payment of the benefit exists. Perhaps the statute instead should allow employees to select a beneficiary for these benefits.

partner enters a new relationship in the nature of a domestic partnership, just as the benefit terminates when a surviving spouse remarries.¹⁶⁵

VI. CONCLUSION

The retirement statute contains rules which are in certain respects too rigid to apply fairly to all of the Commonwealth's public employees and their families. For example, the system contains strict restrictions on who an employee may designate as a beneficiary of his or her retirement allowance, limiting it to certain specific relatives, regardless of the closeness or lack of closeness in the actual relationship.¹⁶⁶ Moreover, the actual relationship of the parties can limit benefits, e.g., the Member Survivor Allowance cannot be claimed by a surviving spouse who deserted the deceased spouse.¹⁶⁷ Thus, in some respects, the retirement system reflects the fact that simple "bright line" familial relationships such as marriage may not always be sufficient to determine fairly who should receive benefits. At the same time, the system unjustifiably places limitations on who an employee can designate as a beneficiary, in disregard of the actual nature of relationships, which may be just as intimate and involve as much financial dependence as relationships within a legally recognized family.

Certain amendments could and should be made in the retirement statute to create a clear category of "domestic partner" for employee-members.¹⁶⁸ This provision would allow members to designate a person who could receive the portion of their pension available to designated surviving family members under the Joint and Last Survivor and Member Survivor beneficiary provisions.¹⁶⁹ A designated domestic partner should also be able to receive accidental death benefits.¹⁷⁰ The designation of "domestic partner" should not involve the Board or the courts in any more case-by-case determinations about member's relationships than the existing statute already requires.¹⁷¹

165. See *supra* text accompanying note 130. While enforcement of this rule could be difficult for domestic partners, enforcement of the lose-benefits-if-you-remarry rule must be difficult too, because how will the Commonwealth know that a surviving spouse has remarried? Presumably receipt of surviving spouse accidental death benefits is conditioned upon the recipient's agreement to inform the Board if she remarries and provides for forfeiture if she does not so inform the Board. This rule could be extended to recipients of domestic partner accidental death benefits.

166. MASS. GEN. L. ch. 32, § 12(2) Option (c), Option (d) (1992).

167. MASS. GEN. L. ch. 32, § 12(2)(d) (1992).

168. See *supra* text accompanying notes 147-52.

169. See *supra* text accompanying notes 147-52, 158-60.

170. See *supra* text accompanying notes 161-65.

171. See *supra* text accompanying note 126. See also *Donnelly v. Contributory Retirement Appeals Bd.*, 15 Mass. App. Ct. 19, 443 N.E.2d 416 (1982), discussed

These changes should not result in a significant monetary burden on the Commonwealth, since the retirement allowance options under section 12(2), Chapter 32 of the Massachusetts General Laws are all actuarially equivalent.¹⁷² The proposed changes would not be difficult to administer, and indeed are in many respects similar to systems already operating in other contexts.¹⁷³ The proposed changes provide a practical opportunity to improve further the retirement system and to remedy the inequities it unfortunately still promotes.¹⁷⁴

supra note 116. The rarity of reported cases on issues such as whether parties were "living together" suggests that litigation on such issues is relatively infrequent.

172. *See supra* text accompanying notes 64-65.

173. *See supra* text accompanying notes 134-43.

174. *See supra* text accompanying notes 133-65.